IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 10, 2009 Session

QUOC TU PHAM, ET AL. v. CITY OF CHATTANOOGA, ET AL.

Appeal from the Chancery Court for Hamilton County
No. 06-0655 W. Frank Brown, III, Chancellor

No. E2008-02410-COA-R3-CV - FILED JULY 20, 2009

The plaintiffs filed an action for declaratory judgment to review an Ordinance changing the zoning of the plaintiffs' property. Upon concluding that the defendants improperly changed the zoning on the subject property, the trial court invalidated the Ordinance. The defendants appeal. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Kenneth O. Fritz, Chattanooga, Tennessee, for the Appellants, City of Chattanooga and the Chattanooga City Council.

Arvin H. Reingold, Chattanooga, Tennessee, for the Appellees, Quoc Tu Pham and An Lee Pham.

OPINION

I. BACKGROUND

The property at issue, located at 4803 Brainerd Road in Chattanooga, contains one building from which two businesses can operate. At all times prior to July 11, 2006, the property was zoned Convenience Commercial C-2. The Zoning Ordinance of the City of Chattanooga describes C-2 zoning as permitting restaurants among other types of businesses. According to the record, a restaurant has been located on the subject property for more than 35 years. More recently, the owners of the property, plaintiffs Quoc Tu Pham and An Lee Pham (the "Phams"), leased the property to tenants who opened the VIP Lounge in the restaurant part (rear) of the building.

In response to noise, parking, and traffic problems relating to the presence of the VIP Lounge, neighboring residential property owners sought a change of zoning. As a result of their efforts, a proposal – Ordinance 11850 – passed the Planning Commission and came before Chattanooga's City

Council ("City Council") (along with the City of Chattanooga, collectively the "defendants"). The Ordinance sought to rezone the rear portion of the Phams' tract of land from C-2 to Neighborhood Commercial C-5.

The City Council first considered the Ordinance on June 13, 2006, even though the minutes of the meeting on that date reflect that neither the Phams nor their attorney were present. After neighboring property owners, a police sergeant, and the City Attorney spoke regarding the proposed zoning change, the Ordinance was passed on first reading. After the second reading of the Ordinance on July 11, 2006, the property was rezoned – the front one-third of the Phams' building retained the original C-2 zoning, while the rear two-thirds was changed to C-5.

On August 9, 2006, the Phams brought the present declaratory judgment action against the defendants to invalidate the Ordinance. Three weeks prior to the filing by the Phams, the State had filed a Petition to Abate a Public Nuisance.[1] An Order to Abate was ultimately issued and the premises were padlocked.[2]

At trial, the Phams asserted that the actions of the defendants were unreasonable, discriminatory, arbitrary, capricious, and unconstitutional. They contended that there was no rational or legally justifiable basis for changing the zoning classification of part of a building by rezoning a section of a parcel of land. According to the Phams, the adoption of the Ordinance placed an unreasonable and arbitrary restriction on the use of their property, denied them their right to the use of the property in violation of their constitutional rights, and caused them the loss of valuable rents and profits.

This matter was heard by the trial court, sitting without a jury, on September 12, 2008. In a well-reasoned Memorandum Order and Opinion issued two weeks later, the trial court ruled in favor of the Phams and invalidated the Ordinance. The defendants filed a timely notice of appeal.

II. STANDARD OF REVIEW

On appeal from a decision of the trial court sitting without a jury, findings of fact are reviewed de novo with a presumption of correctness. Tenn. R. App. P. 13.

It has been held that when a municipal governing body acts pursuant to its delegated police powers to amend a rezoning ordinance, it acts in a legislative capacity. *See Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983). Judicial review of such legislative action is very restrictive because legislative classification in a zoning resolution is valid if any possible reason can

[1] Shaheed Rasheed and his mother, Ameenah A. Rasheed, a/k/a Ameenah R. House, were indicated as the owners/operators of the VIP Lounge.

[2] Under a modification of the temporary restraining order, the Phams were later allowed to enter the property.

be conceived to justify it. *See State ex rel. SCA Chem. Waste Servs., Inc. v. Konigsberg*, 636 S.W.2d 430, 437 (Tenn. 1982). When ruling on the validity of a zoning ordinance under declaratory judgment,

> the courts should not interfere with the exercise of the zoning power and hold a zoning enactment invalid, unless the enactment, in whole or in relation to any particular property, is shown to be clearly arbitrary, capricious, or unreasonable, having no substantial relation to the public health, safety, or welfare, or is plainly contrary to the zoning laws.

Fallin, 656 S.W.2d at 342-43; *see also, Edwards v. Allen*, 216 S.W.3d 278, 284-85 (Tenn. 2007); *MC Props. v. City of Chattanooga*, 994 S.W.2d 132 (Tenn. Ct. App. 1999). When the validity of a zoning ordinance is fairly debatable, the courts may not substitute their judgment for that of the local legislative body. *Family Golf of Nashville v. Metro. Gov't of Nashville & Davidson County*, 964 S.W.2d 254 (Tenn. Ct. App. 1997) (citing *McCallen v. City of Memphis*, 786 S.W.2d 633, 640 (Tenn. 1990)).

III. DISCUSSION

The primary issue presented in this appeal is whether the reasons advanced by the defendants for the Ordinance were fairly debatable.

According to the defendants, the primary premise for the change of zoning was to reduce criminal activity caused by the owners' use of the premises. They contend that their action to re-zone the property to affect only one structure was fairly debatable and was made upon a rational basis. They note the following considerations: 1) Support law enforcement to restrict use of the premises as an illegal adult oriented establishment; 2) restrict use of the premises as a legal location for an adult oriented establishment; 3) limit the impact of a nuisance in the form of illegal parking, noise, and alleged criminal activity from affecting an adjoining residential neighborhood; 4) traffic control; and 5) correct the location of some or all businesses on the property that did not face commercial traffic on Brainerd Road. The defendants additionally cite that the Planning Commission had recommended to the City Council the following additional reasons: 1) the re-zoning only impacted the back section of the property; 2) the business operated on the back section of the structure was a nightclub while the use at the front of the structure was for an office; and 3) the rear section of the structure on the property abuts, adjoins, or is close to a residential neighborhood.

The defendants further relate that there are at least three parcels zoned C-5 and several parcels zoned R-4 and O-1 on the other side of Brainerd Road. They therefore assert the zoning change was not out of character with the land use restrictions occurring in the area; rather, according to the defendants, the modification reflects a trend to change the zoning in this area of Brainerd Road from C-2 to zones with less commercial impact on the adjoining residential neighborhoods. Since the Phams' building is one of the few commercial structures fronting Brainerd Road with significant

frontage on a cross residential street, the defendants claim the zoning change protects the residential character of the area. They additionally note that C-5 zoning still allows the premises to be used as a restaurant – just one without alcoholic beverage sales and seating fewer persons.

The Phams maintain that the action clearly constituted spot zoning. In *Phillips v. Tenn. Dep't of Transp.*, No. M2006-00912-COA-R3-CV, 2007 WL 1237695 (Tenn. Ct. App. M.S., April 26, 2007), this court summarized the Tennessee cases discussing spot zoning:

> Spot zoning is the "process of singling out [a] small parcel of land for use classification totally different from that of [the] surrounding area, for [the] benefit of an owner of such property and to [the] detriment of other owners, and, as such, is [the] very antithesis of planned zoning."

Id. at *4 (citations omitted). Spot zoning is further discussed as follows in 83 Am.Jur.2d *Zoning and Planning* § 110 (2008):

> In order to constitute "illegal spot zoning," a zoning ordinance: (1) must pertain to a single parcel or a limited area, ordinarily for the benefit of a particular property owner or specially interested party; and (2) must be inconsistent with the city's comprehensive plan, or if there is none, with the character and zoning of the surrounding area, or the purposes of zoning regulation, i.e., the public health, safety, and general welfare. In addressing a claim of improper spot zoning, the most important factor is whether the rezoned land is being treated unjustifiably different from the similar surrounding land, thereby creating an island having no relevant differences from its neighboring property.

Id. (citations omitted).

In pertinent part, the trial court held as follows:

> A part of one lot, along at least 17 city blocks zoned C-2 on the same side of Brainerd Road, was rezoned from C-2 to C-5. All of the businesses on that side of Brainerd Road are adjacent to residential areas and zoning. Only one owner was affected. The City of Chattanooga has not cited any legal authority in which a zoning ordinance has been used on one lot, against the owners' will and wishes, to change the lot[s]' zoning status from that of others similarly situated.
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> * * *
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> Ordinance No. 11850, adopted by the City Council, was not in furtherance of any general plan or scheme of zoning. It was action taken against one part of one building on one lot to try to get rid of one tenant. Other similarly zoned and situated businesses were not affected by the amendment to the rezoning ordinance. Here, the rear portion

> of the Phams' lot was singled out by the Council's actions. A use classification, totally different from that of the surrounding area . . . was imposed upon the rear portion of the subject property.
>
> The validity of Ordinance No. 11850 cannot be upheld based upon the facts of this case. While trying to help citizens of the neighborhood is commendable, the City Council's action in passing Ordinance No. 11850 was the wrong action taken to solve a real problem. The City Council passed Ordinance No. 11850 even though the new ordinance had absolutely no affect on the existing use of the property by V.I.P. Lounge. V.I.P. Lounge's use of the property could have continued forever under the grandfather provision even though the property had been rezoned to C-5. Tennessee Code Ann. § 13-7-208(b)(1) (Supp. 2007). The grandfather status would be lost only if the property had not been used in a C-2 use for 30 continuous months. Tennessee Code Annotated § 13-7-208(g) (Supp. 2007). The rezoning action could only adversely affect the Phams as owners of the property or a subsequent lessee. The correct action was taken by the District Attorney General only two days after the adoption of Ordinance No. 11850. The neighbors could have sued V.I.P. Lounge under a nuisance claim.
>
> Based upon all of the evidence presented, it is the court's holding that Ordinance No. 11850 is unconstitutional and/or illegal as contrary to the authority granted to the City by the General Assembly. Ordinance No. 11850 is an example of spot zoning. One cannot use spot zoning to benefit one property owner. The City, likewise, cannot use the same power and procedure to the detriment of one owner. Ordinance No. 11850 is clearly arbitrary, capricious or unreasonable, and has no substantial relationship to the public health, safety, or welfare, and is plainly contrary to the zoning laws. *McCallen*, 786 S.W.2d at 640 (quoting *Episcopal Foundation at Jefferson City v. Williams*, 202 S.2d 726, 729 (Ala. 1967)).

The Phams' property was zoned C-2. Every property on the same side of Brainerd Road as the subject property for a stretch of approximately 17 blocks is zoned C-2. All but two properties on the other side of Brainerd Road are zoned C-2. All of these properties along their rear boundaries, like the Phams' property, are adjacent to residential properties. Among these properties are several restaurants, as well as other businesses. As the trial court summarized the evidence, "[a] part of one lot, along at least 17 city blocks zoned C-2 on the same side of Brainerd Road, was rezoned from C-2 to C-5. . . . Only one owner was affected." The express purpose of the Ordinance was clearly to prohibit the targeted business – VIP Lounge – from continuing its operations. We agree with the trial court that the Ordinance before us is an exercise in spot zoning.

The Ordinance was not consistent with the general zoning scheme nor the character of the area. The maps of record reveal the general zoning scheme for this area was to provide C-2 zoning. While the defendants claim enactment of the Ordinance "reflects a trend to change the zoning in this

area of Brainerd Road from C-2 to zones with less commercial impact on the adjoining residential neighborhoods," the maps show no trend in the zoning in one direction or the other. The record reflects that a restaurant has operated on the Phams' lot for many years. At least four other restaurants operate along this area of Brainerd Road, as well as an automobile repair shop. In addition to eliminating some restaurants, C-5 zoning would also bar automobile repair shops. C-5 zoning therefore does not reflect the zoning in the surrounding area.

The considerations cited by the defendants do not support the Ordinance or make its enactment fairly debatable. There are no rational relationships between the considerations and the Ordinance. None of the considerations raised by the defendants stand up to scrutiny. As the trial court pointed out, there were better avenues available to deal with the problem, such as the nuisance action brought by the District Attorney General, which succeeded in removing the operators of the VIP Lounge.

IV. CONCLUSION

The ruling of the trial court is affirmed and the cause remanded for such further proceedings as may be necessary. Costs are assessed against the appellants, the City of Chattanooga and Chattanooga City Council.

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JOHN W. McCLARTY, JUDGE